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-87-496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLIFFORD M. OVERTON
Gunnery Sergeant,
United States Fleet Marine Corps Reserve,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether Article 2 (a) (6) of the Uniform Code of Military Justice, which subjects members of the United States Fleet Marine Corps Reserve in an inactive duty status to personal court-martial jurisdiction, unconstitutionally encroaches upon the "judicial power of the United States" as vested in the courts established pursuant to Article III of the Constitution of the United States?

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No. ____

CLIFFORD M. OVERTON
Gunnery Sergeant,
United States Fleet Marine Corps Reserve,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Clifford M. Overton, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding on July 27, 1987.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 24 M.J. 309 (C.M.A. 1987) (Appendix A). The opinion of the United States Navy-Marine Corps Court of Military Review, dated August 30, 1985, was unpublished. (Appendix B).

JURISDICTION

The decision of the United States Court of Military Appeals was rendered on July 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8, cl. 14 of the United States Constitution provides: "The Congress shall have power . . . [t]o make rules for the government and regulation of the land and naval forces . . ."

Article III, § 1 of the United States Constitution provides: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, § 2, cl. 1 of the United States Constitution provides: "The judicial power shall extend to all cases, in Law . . . arising under this Constitution [and] the Laws of the United States . . ."

Article III, § 2, cl. 3 of the United States Constitution provides: "The trial of all Crimes . . . shall be Jury . . ."

The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, . . . when in actual service in time of War or public danger . . . ."

STATUTE INVOLVED

Article 2 (a) (6) of the Uniform Code of Military Justice (10 U.S.C. § 802 (a) (6)) provides: "The following people are subject to this chapter . . . (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve."

STATEMENT OF THE CASE

The petitioner served honorably in the United States Marine Corps for over 22 years, eventually attaining the rank of Gunnery Sergeant (pay grade E-7). In 1978 he transferred to the Fleet Marine Corps Reserve and was released from active duty on July 2, 1978.

In May 1982 the petitioner began work as a contract administrator at the Navy Exchange department store at the naval base at Subic Bay, Republic of the Philippines. His job was a civilian position, pay grade GS-09. On October 22, 1983 Naval Investigative Service [NIS] agents apprehended him on suspicion of involvement in the theft of merchandise from the Cubi Point and Subic Bay Navy Exchanges.

The NIS investigation reports were forwarded to the commanding officer of the Subic Bay Public Works Center, who then requested permission from the Secretary of the Navy to try the petitioner by court-martial.[1] Permission was granted and a pretrial investigatory hearing was conducted pursuant to Article 32 of the Uniform Code of Military Justice (10 U.S.C. § 832) [hereinafter cited as UCMJ]. After the pretrial

[1] Permission was requested pursuant to the Manual of the Judge Advocate General of the Navy [hereinafter cited as JAGMAN] § 0116 (c) (1) (a).

hearing, the investigating officer recommended that the case be referred for trial by general court-martial.

On June 5, 6, and 18-20, 1984 the petitioner was tried by general court-martial and found guilty of conspiracy and larceny, in violation respectively of Articles 81 and 121 of the UCMJ (10 U.S.C. §§ 881, 921). He was sentenced to forfeiture of all retainer pay and to be dishonorably discharged from the United States Fleet Marine Corps Reserve. The military convening authority approved the findings and sentenced as adjudged.

On August 30, 1985 the United States Navy-Marine Corps Court of Military Review held that, despite the petitioner's inactive duty status, Article 2 (a) (6), UCMJ (10 U.S.C. § 802 (a) (6)), did not unconstitutionally intrude upon the Article III courts' mandate and did not violate the separation of powers doctrine. The court also affirmed the findings of guilty and the sentence as adjudged below.

The United States Court of Military Appeals granted review of two issues:

I. WHETHER ARTICLE 2 (a) (6) OF THE UNIFORM CODE OF MILITARY JUSTICE, AS APPLIED TO APPELLANT, IS AN UNCONSTITUTIONAL ENCROACHMENT UPON THE "JUDICIAL POWER OF THE UNITED STATES" AS VESTED IN THE COURTS ESTABLISHED PURSUANT TO ARTICLE III OF THE CONSTITUTION?

II. WHETHER A COURT-MARTIAL LACKS SUBJECT MATTER JURISDICTION OVER APPELLANT BECAUSE THE OFFENSES CHARGED WERE NOT "SERVICE CONNECTED"?

On July 27, 1987 the United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review.

REASONS FOR GRANTING THE WRIT

This Court has declared that a strict military status test, and not a "service connection" test, would be applied to determine whether a court-martial could exercise jurisdiction over a military accused. *Solorio v. United States,* ___ US ___, 107 S.Ct. ___, 95 L.Ed.2d, 55 USLW 5038 (June 25, 1987) (No. 85-1581). However, this Court has not yet examined the extent of court-martial jurisdiction over an accused who was at one time an active duty service member but who has since assumed an *inactive* status which only vaguely and distantly associates him with the military. The petitioner's case presents this question.

The petitioner voluntarily assumed membership in the Fleet Marine Corps Reserve after 22 years of honorable service in the United States Marine Corps. The Fleet Marine Corps Reserve is composed of enlisted members of the regular Marine Corps who have completed 20 years active duty and request transfer to the Fleet Reserve's ranks. 10 U.S.C. § 6330 (b). After 30 years of accumulated service they are transferred to the Marine Corps retired list. 10 U.S.C. § 6331 (a). As a Fleet Reservist, the petitioner was not required to attend drills or training exercises, study correspondence courses, or wear a uniform. Record at 11. His sole military "obligation" is to update his service record with any changes to his name, mailing address, residence, number of dependents, or the identity of his next of kin.

Although a Fleet Reservist may be ordered to active duty without his consent during time of war or national emergency declared by Congress or the President, or for a total of two months' active duty for

training every four years in peacetime, 10 U.S.C. §§ 6485 (a)-(b), the petitioner has never been recalled. Record at 11. As compensation, the petitioner has been entitled to receive monetary payments called "retainer pay" since his transfer to the Fleet Marine Corps Reserve. 10 U.S.C. § 6330 (c). The question before this Court is whether the United States Congress may effectively limit the powers of Article III courts by exercising court-martial jurisdiction over the petitioner, whose ties to the military are so very tenuous.

Article III of the United States Constitution establishes the judiciary as a coequal branch of government and gives it the power to try criminal cases. The same article ensures that all criminal trials shall be by jury. The Fifth Amendment to the United States Constitution guarantees that a trial shall be preceded by grand jury indictment, "except in cases arising in the land or naval forces . . . when in *actual service* in time of War or public danger." [Emphasis added]. Although Article I, §8, cl. 14 empowers Congress to "make rules for the government and regulation of the land and naval forces" and so to promulgate a Uniform Code of Military Justice and establish courts-martial, this Court has emphasized that such courts are the narrow exception to the preferred rule of trial by civilian courts. *Reid v. Covert,* 354 U.S. 1, 21 (1957). Further, this Court has stated: "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts." *Id.*

This Court has therefore limited court-martial jurisdiction to persons who are "actually members", "part of", or who may "fairly be said to be 'in' the military service." *United States ex rel Toth v. Quarles,*

350 U.S. 11, 15 (1955); *Reid v. Covert,* 354 U.S. at 22. If Congress expands court-martial jurisdiction beyond such limits, it has exceeded its powers to prescribe rules for the land and naval forces and unconstitutionally encroached upon the jurisdiction of Article III courts. *See Kinsella v. United States,* 361 U.S. 234, 247-249 (1960); *Toth v. Quarles,* 350 U.S. at 14-16. As a result, this Court has held that it was unconstitutional to court-martial the following individuals: a serviceman who has already been honorably discharged (*Toth v. Quarles,* 350 U.S. at 23); civilian military employees working overseas (*McElroy v. United States,* 361 U.S. 281 (1960); *Grisham v. Hagan,* 361 U.S. 278 (1960)); and civilian dependents of military servicemembers on active duty overseas (*Reid v. Covert,* 354 (1957); *Kinsella v. United States,* 361 U.S. 234 (1960)). Each of these classes of accused may be said to have some close connection to the uniformed services; it may be said of each class that military discipline and (to some minor degree) combat readiness are enhanced by subjecting them to prompt trial and punishment by court-martial. However, this Court has upheld their constitutional rights as civilian citizens of the United States, and the principle of separation of powers, by disapproving the extension of court-martial jurisdiction to them.

Neither should the government be heard to complain that there was no alternative forum in which to try the petitioner. The United States District Courts did indeed have extraterritorial jurisdiction over the federal civilian offenses of conspiracy and larceny of government property. *See* 18 U.S.C. §§ 371, 641; *United States v. Cotten,* 471 F.2d 744 (9th Cir. 1973), *cert. denied,* 411 U.S. 936 (1973); *Brulay*

v. United States, 383 F.2d 345 (9th Cir 1967), *cert. denied,* 389 U.S. 986 (1967).

In the petitioner's case below (Appendix A) the United States Court of Military Appeals held that the petitioner's voluntary enrollment in the Fleet Marine Corps Reserve and his acceptance of retainer pay removes any doubt that Congress's decision to subject Fleet Reservists to court-martial jurisdiction was both constitutional and wise. *United States v. Overton,* 24 M.J. 309, 311 (C.M.A. 1987). The petitioner respectfully submits that his acceptance of money or retirement benefits earned prior to the commission of the offenses at issue should not determine the constitutionality of Congress's decision to subject him to trial by court-martial. Surely the Constitution's drafters did not intend that the carefully drawn scheme of separation of powers be determined by one person's acceptance of remuneration.

Likewise, the "voluntary" aspect of the petitioner's decision to join the Fleet Marine Corps Reserve should not be overemphasized. At the time of the petitioner's separation from active duty the government presented him with a false choice: remain on active duty for another 10 years, leave the service altogether and receive no compensation for 10 years despite his 22 years honorable service, or request transfer to the Fleet Marine Corps Reserve and receive partial compensation. The petitioner made the obvious choice. He could not reasonably have foreseen the military's long arm would grasp him more than five years after he had removed his uniform and left active service. If he had known of the military's reach, it is at least less likely he would have joined the Fleet Reserve with the consequence of losing his right to indictment

by grand jury and trial by a jury of his civilian peers. At the time of his transfer to inactive reserve status, *both* he and the government understood that his "duties" would be extremely limited. The facts therefore strongly suggest that both the petitioner and the government saw him as a *retired* and *inactive* former servicemember whose period of duty and self-sacrifice had long since passed. The petitioner's voluntary transfer to the Fleet Marine Corps Reserve after 22 years' active duty was not an enrollment in yet another military organization. It was a voluntary *dis*-enrollment with the government's concurrence from the duties he had previously performed.

It is interesting to compare the petitioner's status with that of another "employee" of the United States Naval Service of a bygone era, the shipboard clerk of a Navy paymaster. *See Ex Parte Reed,* 100 U.S. 13 (1879). As Justice Clark noted in *McElroy,* the armed services have often enlisted the services of specialists like accounting clerks and construction engineers (e.g. the Navy's "Seabees"). *McElroy v. United States,* 361 U.S. at 286-287. The government may remove any doubt as to the specifically military status of these servicemembers and the immediate military significance of their duties by requiring them to wear the uniform of the service, have a fixed rank, and sign an agreement to submit themselves to the requirements of military justice. *Ex Parte Reed,* 100 U.S. at 22. Apparently, the government did not believe it was necessary that the petitioner, or any Fleet Reservist, appear to be anything other than a civilian with a civilian occupation. The petitioner respectfully submits that membership in the Fleet Reserve or Fleet Marine Corps Reserve is not a military "status" at

all, but merely an administrative convenience similar to selective service registration in peacetime: once registered, the enrollee goes about his or her business in the civilian world with the full protection of the United States Constitution, free of the rigors and abbreviated procedures of military justice.

In its consideration of this case the Court may wish to discern whether the Founding Fathers would have considered the petitioner a member of the "land and naval forces" and subject to its disciplinary system. The concept of a military reserve force that is neither retired nor on active duty is, however, of a very recent vintage. National Defense Act of 1916, 39 Stat. 166 (establishing the Naval Reserve Force). If this Court subjects the petitioner to court-martial jurisdiction, it would be *extending* court-martial jurisdiction in a way the Founders could not have anticipated. The petitioner respectfully urges this Court not to engage in such unwarranted speculation, but to follow the *Toth* rationale: when it appears necessary to restrict civil liberties and allow a diminution of the Article III courts' powers to satisfy the requirements of military discipline, the method chosen must indeed be "the least possible power adequate to the end proposed." *Toth v. Quarles,* 350 U.S. at 23. By that standard, the power exercised in this instance is unwarranted.

CONCLUSION

The petitioner respectfully submits that his petition for a writ of certiorari should be granted to preserve the separation of powers and restore to him his full panoply of trial rights under the United States Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES,

Appellee,

v.

CLIFFORD M. OVERTON, Gunnery Sergeant U.S. Marine Corps,

Appellant.

No. 53,512
NMCM 84 4445

U.S. Court of Military Appeals.

July 27, 1987.

Accused, a gunnery sergeant transferee to the Fleet Marine Corps Reserve, was convicted by general court-martial convened by the commander, United States Naval Forces, Subic Bay, Republic of the Philippines, of conspiring to steal property of a Navy Exchange and larceny of property from that Navy Exchange, and he appealed. The United States Navy-Marine Corps Court of Military Review, 20 M.J. 998, held that court-martial had jurisdiction to try accused. Review was granted. The United States Court of Military Appeals, Sullivan, J., held that: (1) UCMJ Article subjecting members of Fleet Reserve and Fleet Marine Corps Reserve to Uniform Code of Military Justice and thus to court-martial jurisdiction was constitutional as applied to former marine who had voluntarily joined Fleet Marine Corps Reserve and received retainer pay, and (2) offenses of which accused was found guilty were service-connected and were thus properly tried by court-martial.

Affirmed.

For Appellant: *Major James Carlsen,* USMC (argued); *Lieutenant Commander James J. Quigley,* JAGC, USN and *Lieutenant Leonard R. Cleavelin,* JAGC, USNR (on brief).

For Appellee: *Major F.F. Krider,* USMC (argued); *Commander Michael P. Green,* JAGC, USN and *Captain Robert T. Maguire,* USMCR (on brief); *Captain Carl H. Horst,* JAGC, USN and *Captain Wendell A. Kjos,* JAGC, USN.

Amicus Curiae:

Eugene R. Fidell, Esq. (argued); Arthur B. Spitzer, Esq.—For the American Civil Liberties Union Fund of the National Capital Area.

Opinion of the Court

SULLIVAN, Judge:

Appellant was tried by a general court-martial composed of a military judge alone at the Naval Legal Service Office, Subic Bay, Republic of Philippines, during June 1984. Contrary to his pleas, he was found guilty of three specifications of conspiracy to commit larceny of various consumer electronic items from the Navy Exchange, in violation of Article 81, Uniform Code of Military Justice, 10 U.S.C. § 881. He was also found guilty of four specifications of larceny of various consumer electronic items from the Navy Exchange during October 1983, in violation of Article 121, UCMJ, 10 U.S.C. § 921. Appellant was sentenced to a dishonorable discharge and forfeiture of all retainer pay. The convening authority approved the sentence as adjudged. The Court of Military Review affirmed on August 30, 1985. 20 M.J. 998.

This Court granted review on the following questions of law:

I

WHETHER ARTICLE 2(a)(6) OF THE UNIFORM CODE OF MILITARY JUSTICE, AS APPLIED TO APPELLANT, IS AN UNCONSTITUTIONAL ENCROACHMENT UPON THE "JUDICIAL POWER

OF THE UNITED STATES" AS VESTED IN THE COURTS ESTABLISHED PURSUANT TO ARTICLE III OF THE CONSTITUTION.

II

WHETHER A COURT-MARTIAL LACKS SUBJECT-MATTER JURISDICTION OVER APPELLANT BECAUSE THE OFFENSES CHARGED WERE NOT "SERVICE-CONNECTED."

Resolving these questions against appellant, we affirm the findings of guilty and sentence. *See United States v. Bowie*, 14 U.S.C.M.A. 631, 34 C.M.R. 411 (1964); *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

The facts necessary to deciding these issues were found by the Court of Military Review. It stated:

> The appellant first enlisted in the Marine Corps on 27 May 1956 and served continuously until 2 July 1978 (a period exceeding 22 years), when he was transferred to the U.S. Fleet Marine Corps Reserve. He commenced working as a civilian employee of the U.S. Government at the Naval Station, Subic Bay, in May 1982. In September of 1983 a security guard at the Subic Bay area Navy Exchanges, Mr. Alvin L., was solicited to join a group of persons who were stealing items from various Navy Exchange facilities apparently for sale on the black market to individuals not eligible for purchase of the goods through normal channels. Mr L pretended interest in the proposition but in fact reported the matter to a Naval Investigative Service (NIS) agent with whom he was acquainted. At the suggestion of his NIS contact, Mr. L played along with the scheme, which functioned through false documentation, manipulation of records, and illicit removal of goods from Navy Exchange premises with the cooperation of security guards who

> were "on the take." Eventually the agents sprung a trap, based on Mr. L's information, and apprehended the appellant while he was transporting stolen goods in his automobile. Permission of the Secretary of the Navy was sought and received to try the appellant at court-martial pursuant to section 0116, JAG Manual, and the case was subsequently referred to general court-martial. Before trial commenced the appellant filed a petition for extraordinary relief with the Court of Military Appeals (C.M.A.), requesting an order, *inter alia*, to cease and desist from his further prosecution. Trial commenced but in its course C.M.A. first stayed further proceedings and then vacated that stay. At trial the appellant vigorously contested jurisdiction over him. He admitted that he was receiving retainer pay for his service in the Fleet Marine Corps Reserve but pointed out that he had never been "recalled to active duty" or required to train or drill in connection with his duties as a member of the Fleet Marine Corps Reserve, to take any correspondence course, or to do anything else to keep his military status current. Nevertheless, the military judge found jurisdiction pursuant to Article 2(a)(6), UCMJ.

Unpub. op. at 1-2.

Article 2(a)(6), UCMJ, 10 U.S.C. § 802(a)(6), provides that "[m]embers of the Fleet Reserve and the Fleet Marine Corps Reserve" are subject to the Uniform Code of Military Justice and therefore to court-martial jurisdiction. It is uncontroverted that appellant was a member of the Fleet Marine Corps Reserve at the time of these offenses and his court-martial. Nevertheless, appellant asserts that Article 2(a)(6) is an unconstitutional exercise of power by Congress which cannot lawfully authorize his trial by court-martial. *See generally United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 76 S. Ct. 1, 100 L.Ed. 8 (1955). We disagree.

Appellant voluntarily joined the Fleet Marine Corps Reserve. 10 U.S.C. § 6330(a)(2). He was "[a]n enlisted member of the Regular Marine Corps . . . who ha[d] completed 20 or more years of active service in the armed forces . . . [who], at his request, . . . [was] transferred to the Fleet Marine Corps Reserve." 10 U.S.C. § 6330(b). As such, he was subject to being

> Ordered by competent authority to active duty without his consent—
> (1) in time of war or national emergency declared by Congress, for the duration of the war or national emergency and for six months thereafter;
> (2) in time of national emergency declared by the President; or
> (3) when otherwise authorized by law.

10 U.S.C. § 6485(a). In addition, he was also subject to the following provision of § 6485:

> (b) In time of peace any member of the Fleet Reserve or the Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period.

Finally, as a member of the Fleet Reserve and Fleet Marine Corps Reserve, he received "retainer pay" computed on the "basic pay . . . received at the time of transfer" to the Fleet Reserve or Fleet Marine Corps Reserve and "years of active service." 10 U.S.C. §6330(c)(1).

Congress, in its wisdom, has decided that court-martial jurisdiction may be exercised over members of the Fleet Marine Corps Reserve. *Cf. Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986). This grant of jurisdiction is neither novel nor arbitrary. *See generally* Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. Pa. L. Rev. 317, 331-40 (1964). Although some civilian and military leaders have expressed doubt with respect to the wisdom

of this judgment, *see* Blair, *Court-Martial Jurisdiction Over Retired Regulars: An Unwarranted Extension of Military Power*, 50 Geo. L. J. 79 (1961), we do not. *See United States v. Cole*, 24 M.J. 18, 22 (C.M.A. 1987). *See generally Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 1313, 89 L.Ed.2d 478 (1986). This type of exercise of court-martial jurisdiction has been continually recognized as constitutional. *See McCarty v. McCarty*, 453 U.S. 210, 221-22, 101 S. Ct. 2728, 2735-36, 69 L.Ed.2d 589 (1981); *United States v, Tyler*, 105 U.S. (15 Otto) 244, 246, 26 L.Ed.2d 985 (1882); *United States v. Bowie* and *United States v. Hooper*, both *supra*. *See generally* Notes and Comments, *The Retired Regular Officer: Status, Duties, and Responsibilities*, 26 A.F. JAG L. Rev. 111 (1987). Appellant has not persuaded us today to the contrary.

The second question we will decide is whether the offenses for which appellant was found guilty were properly tried by court-martial. *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291(1969). Jurisdiction at the time of this trial depended on whether the offenses were service connected. *Schlesinger v.Councilman*, 420 U.S. 738, 760, 95 S.Ct. 1300, 1314, 43 L.Ed.2d 591 (1975). *See generally United States v. Abell*, 23 M.J. 99 (C.M.A. 1986). Examination of the offenses in light of the factors articulated in *Relford v. Commandant*, 401 U.S. 355, 365, 91 S.Ct. 649, 655, 28 L.Ed.2d 102 (1971), clearly establish court-martial jurisdiction.

We first note that the offenses were committed on a military base, United States Naval Station, Subic Bay. Moreover, this Naval Station was located outside our territorial limits in the Republic of the Philippines. The property which was the subject of these offenses was owned by the United States Government and offered for sale in the Navy Exchange. The military judge took judicial notice of the fact that the profits from the Navy Exchange were directed towards the Morale and Recreation Fund which directly benefited servicemembers on the Naval Station.

This was a crime against property on the base, and it is, therefore, service connected. *Relford v. Commandant, supra* at 369, 91 S.Ct. at 657.*

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge EVERETT and Judge COX concur.

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* The same result would be reached if the recent decision of the Supreme Court in *Solorio v. United States*, — U.S. —, 107 S.Ct., — 95 L.Ed.2d — No. 85-1581, 55 L.W. 5038 (June 25, 1987), is retroactive. *See generally Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973).

APPENDIX B

DEPARTMENT OF THE NAVY
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IN THE U.S NAVY-MARINE CORPS COURT OF MILITARY REVIEW BEFORE

JOHN W. KERCHEVAL II, MICHAEL D. RAPP, JOHN E. GRANT JR.

UNITED STATES

v.

CLIFFORD M. OVERTON, 326 32 6708
Gunnery Sergeant (E-7),
U.S. Marine Corps, Fleet Reserve

NMCM 84 4445 Decided 30 August 1985

Sentence adjudged 20 June 1984. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Philippines, Subic Bay, Republic of the Philippines.

MAJ MICHAEL E. CANODE, USMC, Appellate Defense Counsel
LT STEVEN P. BENSON, JAGC, USNR, Appellate Government Counsel

RAPP, Judge:

At a general court-martial, military judge alone, the appellant on 20 June 1984 was, contrary to his pleas, convicted of three violations of Article 81, Uniform Code of Military Justice (UCMJ), conspiring with two others to steal property of the Navy Exchange at Naval Station,

Subic Bay, Republic of the Philippines, and four violations of Article 121, UCMJ, larceny of property from that Navy Exchange. He was sentenced to a dishonorable discharge from the U.S. Marine Corps Fleet Reserve and total forfeiture of all retainer pay.

Before us the appellant has raised one assignment of error:

> ARTICLE 2 (A) (6), UNIFORM CODE OF MILITARY JUSTICE, AS APPLIED TO APPELLANT IN THIS CASE IS UNCONSTITUTIONAL AND THEREFORE THE COURT-MARTIAL LACKED JURISDICTION TO TRY APPELLANT.

The appellant first enlisted in the Marine Corps on 27 May 1956 and served continuously until 2 July 1978 (a period exceeding 22 years), when he was transferred to the U.S. Fleet Marine Corps Reserve. He commenced working as a civilian employee of the U.S. Government at the Naval Station, Subic Bay, in May 1982. In September of 1983 a security guard at the Subic Bay area Navy Exchanges, Mr. Alvin L., was solicited to join a group of persons who were stealing items from various Navy Exchange facilities apparently for sale on the black market to individuals not eligible for purchase of the goods through normal channels. Mr. L pretended interest in the proposition but in fact reported the matter to a Naval Investigative Service (NIS) agent with whom he was acquainted. At the suggestion of his NIS contact, Mr. L played along with the scheme, which functioned through false documentation, manipulation of records, and illicit removal of goods from Navy Exchange premises with the cooperation of security guards who were "on the take." Eventually the agents sprung a trap, based on Mr. L's information, and apprehended the appellant while he was transporting stolen goods in his automobile. Permission of the Secretary of the Navy was sought and received to try the appellant at court-martial

pursuant to section 0116c, JAG Manual, and the case was subsequently referred to general court-martial. Before trial commenced the appellant filed a petition for extraordinary relief with the Court of Military Appeals (C.M.A.), requesting an order, *inter alia*, to cease and desist from his further prosecution. Trial commenced but in its course C.M.A. first stayed further proceedings and then vacated that stay. At trial the appellant vigorously contested jurisdiction over him. He admitted that he was receiving retainer pay for his service in the Fleet Marine Corps Reserve but pointed out that he had never been "recalled to active duty" or required to train or drill in connection with his duties as a member of the Fleet Marine Corps Reserve, to take any correspondence course, or to do anything else to keep his military status current. Nevertheless, the military judge found jurisdiction pursuant to Article 2(a)(6), UCMJ.

Several statutory provisions are directly applicable to this case. Article 2, UCMJ, purports to establish jurisdiction and states:

> (a) The following persons are subject to this chapter:
>
> . . . .
>
> (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

The terms "Fleet Reserve" and "Fleet Marine Corps Reserve" are explained in other federal statutes. Title 10 U.S.C. section 6330 states:

> (a) The Fleet Reserve and the Fleet Marine Corps Reserve are composed of members of the Naval Service transferred thereto under—
>
> (1) Title II of the Naval Reserve Act of 1938 (52 Stat. 1178), as amended; or
>
> (2) this section.

> (b) . . . An enlisted member of the Regular Marine Corps or the Marine Corps Reserve who has completed 20 years of active service in the armed forces may, at his request, be transferred to the Fleet Marine Corps Reserve.

Title 10 U.S.C. section 6485 subjects a member of the Fleet Marine Corps Reserve to specific obligations:

> (a) A member of the Fleet Reserve or the Fleet Marine Corps Reserve may be ordered by competent authority to active duty without his consent—
>
> (1) in time of war or national emergency declared by Congress, for the duration of the war or national emergency and for six months thereafter;
> (2) in time of national emergency declared by the President; or
> (3) when otherwise authorized by law.
>
> (b) In time of peace any member of the Fleet Reserve or Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period.

A member of the Fleet Reserve and Fleet Marine Corps Reserve receives a "retainer" pay computed on the basic pay received at the time of transfer to the Fleet Reserve or Fleet Marine Corps Reserve and years of active service. 10 U.S.C. section 6330(c).

The appellant essentially argues that Article 2(a)(6) constitutes an attempt to violate the separation of powers doctrine. While conceding that Article I (legislative) courts are constitutionally permissible he contends that the jurisdiction of such courts must be strictly limited to avoid improper impingement by another branch of government on the province of Article III (judicial) courts. In the context of the present case, he agrees that the Congress can

properly establish courts-martial under its Article I, section 8, clause 14, power to "make Rules for the Government and Regulation of the land and naval forces" and the "necessary and proper" provisions of clause 18. He asserts, though, that the group of persons included in the membership of the "land and naval forces" must be narrowly circumscribed to preclude undue extension of executive branch powers, particularly in view of the lesser panoply of rights available at court-martial vis-a-vis Article III courts, and strongly argues that a member of the Fleet Marine Corps Reserve cannot constitutionally be included in "land and naval forces." He is on solid ground and supported by federal case law of long-standing throughout most of his argument but goes astray where he insists that Article 2(a)(6) is an unwarranted extension of court-martial jurisdiction, as military and federal case law are to the contrary. In *United States ex rel Pasela v. Fenno*, 76 F.Supp. 203 (1947), the district court specifically ruled that the predecessor provision of Article 2(a)(6) in the Naval Reserve Act of 1938 (34 U.S.C. section 853) was constitutional, and that decision was affirmed on appeal. *Pasela v. Fenno, aff'd sub nom United States ex rel Pasela v. Fenno*, 167 F.2d 593 (2d Cir. 1948). Closer to home, in *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958), C.M.A. upheld the jurisdiction created by Article 2(a)(4) over, "Retired members of a regular component of the armed forces who are entitled to pay," and in a case involving the same retired member the Court of Claims agreed. *Hooper v. United States*, 326 F.2d 982 (Ct.Cl. 1964), *cert. denied*, 377 U.S. 977, 84 S.Ct. 1882, 12 L.Ed.2d 746 (1964). The C.M.A. confirmed that position in *United States v. Bowie*, 14 U.S.C.M.A. 631, 34 C.M.R. 411 (1964). We see no need to reiterate the reasoning of the courts in those cases, which is set forth unequivocally and abundantly. Their principles and rationale have not been called into question by the Court of Military Appeals or the U.S. Supreme Court, and we are thus persuaded that these

cases are equally applicable to members of the Fleet Marine Corps Reserve. Significantly, these cases were decided well after the case upon which the appellant most strongly relies, *United States ex rel Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955), so we reasonably assume the courts were familiar with that decision but were unpersuaded by it. This is not surprising, as *Toth* involved an ex-service member whose connection with the armed forces had been completely severed. Similarly, other categories of persons found not within the "land and naval forces," and thus not subject to court-martial jurisdiction, were never members of such forces in the first place. *See Kinsella v. United States ex rel Singleton*, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960) and *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (dependents accompanying service personnel overseas). *See also McElroy v. United States ex rel Guagliardo*, 361 U.S. 281, 80 S.Ct. 305, 4 L.Ed.2d 282 (1960) and *Grisham v. Hagan*, 361 U.S 278, 80 S.Ct. 310, 4 L.Ed.2d 279 (1960) (civilian employees of the military serving overseas). As a result, these decisions are not precedent for the present case. Appellant, on the other hand, has never left the Naval Service but instead has merely been "transferred" (in the exact words of the statute) from one component to another—not retired, not discharged, not separated—and continues to receive "retainer" pay in return for his membership in the Fleet Marine Reserve. "Retainer" means a claim upon an individual's services in case of need, according to Webster's Third New International Dictionary, and appears to be an apt description of compensation for the sort of contingent obligation imposed by 10 U.S.C. section 6330, which patently allows, but does not compel, the Government to make a specific claim upon a member and requires the member to make himself available if called. Moreover, the requirement for subject-matter jurisdiction effectively precludes unwarranted extension of Article 2(a)(6).

Thus, contrary to the appellant's claims, we see a direct and substantial connection between him and the Marine Corps which continues to make him part of the "land and naval forces." Considering our own determination and the unequivocal position of military and federal case law on the subject, we conclude that Article 2(a)(6), UCMJ, is a constitutionally permissible extension of court-martial jurisdiction.

Accordingly, the findings and sentence, as approved on review below, are affirmed.

/s/MICHAEL D. RAPP
MICHAEL D. RAPP

Senior Judge KERCHEVAL and Judge GRANT concur.

(ABSENT/CONCURS)
JOHN W. KERCHEVAL II

/s/JOHN E. GRANT, JR.
JOHN E. GRANT, JR.